Supreme Court, U.S.
FILED

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No.

In the

Supreme Court of the United States

ABDUL RAHMAN ALMAGHZAR,

Petitioner,

v.

ALBERTO GONZALES, United States Attorney General,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

---

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did section 106(c) of the REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231, repeal the Circuit Court of Appeals' jurisdiction to consider a pending appeal of a district court decision denying a habeas corpus petition, filed pursuant to 28 U.S.C. § 2241, by a detained alien who had been denied Convention Against Torture relief and ordered deported to Yemen?

2. Did the Court of Appeals' decision to convert petitioner's appeal of a denied habeas corpus petition into a petition for review violate the Fifth Amendment's guarantee of due process of law when the conversion resulted in the exclusion of evidence presented to the district court in a contested evidentiary hearing?

3. Does section 106(a) of the REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231, violate the Suspension clause, Article I, section 9 of the United States Constitution, by depriving petitioner of the right to petition for a writ of habeas corpus?

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the following list identifies all of the parties appearing here, before the United States Court of Appeals for the Ninth Circuit and before the United States District Court for the District of Oregon.

Petitioner here and Appellant below is Abdul Rahman Almaghzar, citizen of Yemen.

The Appellees below and Respondents here are Alberto Gonzales, United States Attorney General; Michael Chertoff, Secretary, United States Department of Homeland Security; and Paul Barnett, Administrator, Northern Oregon Correctional Facility.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Abdul Rahman Almaghzar respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals entered in the proceedings below.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 457 F.3d 915 and is reprinted in the Appendix. The opinion and order of the United States District Court for the District of Oregon is reported at 2004 U.S. Dist. LEXIS 18854 and is reprinted in the Appendix. The decision of the Board of Immigration Appeals and the decision of the Immigration Judge are not reported, but copies are included in the Appendix.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit filed its opinion on June 8, 2006. The opinion was amended on August 3, 2006. Petitioner sought rehearing and rehearing en banc. The order denying rehearing and rehearing en banc was filed on October 26, 2006. Pursuant to Rule 13.3, this petition is timely filed within 90 days of that date. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS

This case involves sections 106(a) and (c) of the REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231; 28 U.S.C. § 2241; 28 U.S.C. § 2253; the Suspension Clause, U.S. Const. art. I, § 9, cl. 2; and the Due Process Clause of the Fifth Amendment, U.S. Const. amend. V. These provisions are reproduced in the Appendix.

STATEMENT OF THE CASE

Petitioner, Mr. Abdul Almaghzar, is a forty-four year old citizen of Yemen who arrived in the United States in November 1992 and applied for asylum one month later. Appendix ("App") 6a. As a former police and internal security officer in North Yemen, Mr. Almaghzar had been imprisoned and tortured in South Yemen for over four years, from approximately 1978 – 1982. App. 33a-35a. After the reunification of North and South Yemen in 1990, many former South Yemeni officials gained positions in the unified government, including some of the same individuals who had assisted in capturing Mr. Almaghzar in 1978. App. 36a. Because of his political activities and work with the Interior Ministry, Mr. Almaghzar became entangled in a deadly rift that developed between competing factions within the Yemeni government. Afraid that his life was in danger, Mr. Almaghzar obtained a visa to come to the United States, ostensibly to serve as a bodyguard for an Interior Ministry official, and fled Yemen in 1992. App. 37a.

Mr. Almaghzar's asylum application languished for six years, until it was considered by an Immigration Judge in removal proceedings conducted in Portland, Oregon, on November 13, 1998. App. 6a-7a. The Immigration Judge denied Mr. Almaghzar's application for asylum and withholding of removal and ordered him removed to Yemen. App. 7a. The Immigration Judge found that Mr. Almaghzar had not testified credibly and that he was barred from receiving asylum, withholding of removal or any other benefit under the Immigration and Nationality Act, pursuant

to 8 U.S.C. § 1158(d)(6) (1998), because he had knowingly filed a frivolous asylum application. App. 7a. At the time of the hearing in 1998, relief pursuant to the Convention Against Torture was not yet available. See 8 C.F.R. § 1208.18(b)(1).

Mr. Almaghzar appealed the Immigration Judge's decision to the Board of Immigration Appeals. While his case was on appeal to the Board of Immigration Appeals, Mr. Almaghzar was convicted in federal court in Portland, Oregon, of distributing methamphetamine and the unlawful use of a food benefit authorization card, in violation of 21 U.S.C. § 841(a)(1) and 7 U.S.C. § 2024(b), respectively. App. 39a. He was sentenced to thirty-seven months imprisonment.

Upon completion of his criminal sentence, Mr. Almaghzar's asylum case was remanded to the Immigration Judge, who conducted a second hearing on June 30, 2003. App. 57a. At that hearing, Mr. Almaghzar attempted to present evidence documenting his mental disability and establishing eligibility for relief under the Convention Against Torture. See 8 C.F.R. §§ 1208.16; 1208.17 and 1208.18.

The Immigration Judge determined that Mr. Almaghzar was no longer eligible for asylum because he had been convicted of a particularly serious crime. See 8 U.S.C. §§ 1158(b)(2)(A) and (B). App. 58a. The Immigration Judge disregarded the expert psychological opinion testimony and psychological assessment proffered by Mr. Almaghzar because the psychologist had not been aware of Mr.

Almaghzar's conviction for unlawful use of a food benefit authorization card at the time of testing and evaluating Mr. Almaghzar. App. 60a. The Immigration Judge reinstated his prior adverse credibility finding and denied Mr. Almaghzar's application for protection under the Convention Against Torture. App. 61a. Mr. Almaghzar appealed this decision to the Board of Immigration Appeals.

A single member of the Board of Immigration Appeals dismissed Mr. Almaghzar's appeal on December 12, 2003. The single Board member upheld the Immigration Judge's adverse credibility determination and did not discuss the Convention Against Torture claim. App. 50a-55a.

Mr. Almaghzar sought review by way of a petition for review and a habeas corpus petition in district court. The initial petition for review was dismissed for lack of jurisdiction because of the criminal conviction and the district court denied Mr. Almaghzar's petition for writ of habeas corpus on September 14, 2004. App. 32a. After conducting an evidentiary hearing in which Mr. Almaghzar presented expert opinion evidence of his mental condition and the effects of past trauma, the district court concluded that substantial evidence supported the Immigration Judge's factual findings and that Mr. Almaghzar's due process rights had not been violated. App. 46a-48a.

Pursuant to 28 U.S.C. § 2253, Mr. Almaghzar appealed the denial of his petition for writ of habeas corpus to the United States Court of Appeals for the Ninth Circuit. App. 4a.

While Mr. Almaghzar's appeal was pending with the Ninth Circuit Court of Appeals, Congress enacted the REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 (May 11, 2005), which eliminated habeas corpus jurisdiction over a challenge to an administrative order of removal and required transfer of any habeas corpus petition then pending in district court to the appropriate Court of Appeals, to be treated as a timely filed petition for review. See 8 U.S.C. § 1252(a)(5) (enacted by REAL ID Act § 106(a)(1)(B)); REAL ID Act § 106(c).

The Ninth Circuit Court of Appeals, recognizing that the REAL ID Act was silent concerning the treatment of a pending appeal of a habeas corpus petition, chose to follow its decision in Alvarez-Barajas v. Gonzales, 418 F.3d 1050, 1052-53 (9th Cir. 2005), and treat Mr. Almaghzar's appeal as if it were a petition for review. Almaghzar v. Gonzales, 457 F.3d 915, 918 n.1 (9th Cir. 2006); App. 5a.

Treating Mr. Almaghzar's appeal as if it were a petition for review, the Ninth Circuit concluded that Mr. Almaghzar had been provided a sufficient opportunity to present his Convention Against Torture claim, that the Immigration Judge's adverse credibility determination was supported by substantial evidence, that Mr. Almaghzar's due process rights had not been violated and that the denial of Convention Against Torture relief was properly determined on the merits. Almaghzar v. Gonzales, 457 F.3d at 918; App. 4a-5a. In dissent, Judge Fisher reasoned that the Immigration Judge completely ignored controlling precedent and that Mr. Almaghzar's Convention Against Torture application should be remanded to the agency. Almaghzar, 457 F.3d at 924;

App. 20a-21a. Rehearing was sought by Mr. Almaghzar and denied by order of the Court of Appeals on October 26, 2006. App. 63a.

REASONS FOR GRANTING THE WRIT

I. The REAL ID Act did not repeal the Court of Appeals jurisdiction to consider an appeal of a denied habeas corpus petitior that was pending with the Court of Appeals on the date of its enactment because it was silent as to how such an appeal should be treated.

On May 11, 2005, Congress passed the REAL ID Act, which, among other things, eliminated habeas corpus jurisdiction over an administrative order of deportation or removal. REAL ID Act, Pub. L. No. 109-13, 119 Stat. 231, § 106(a). In addition, the REAL ID Act amended the Immigration and Nationality Act to make a petition for review filed in a Circuit Court of Appeals the sole and exclusive means for judicial review of a claim under the United Nations Convention Against Torture. Id. at § 106(a)(1)(B) (amending 8 U.S.C. § 1252). These judicial review provisions took effect upon enactment and apply to cases in which the final order of deportation, exclusion or removal was issued before, on, or after the date of enactment. REAL ID Act at § 106(b). Section 106(c) of the REAL ID Act required district courts to transfer any habeas corpus petition pending before the district court on the date of enactment to the appropriate Court of Appeals, to be treated as if it were a petition for review. REAL ID Act at § 106(c). Congress was silent with regards to how a pending appeal of a habeas corpus petition should be treated by the Court of Appeals.

To date, all of the circuit Courts of Appeal that have considered the question of how to treat a pending appeal of a habeas corpus petition post-REAL ID Act have chosen to construe Congressional silence as an oversight and have converted the habeas corpus petition to a petition for review. Alvarez-Barajas v. Gonzales, 418 F.3d 1050, 1053 (9th Cir. 2005); Bonhometre v. Gonzalez, 414 F.3d 442, 446 (3rd Cir. 2005); Gittens v. Menifee, 428 F.3d 382, 385-86 (2nd Cir. 2005); Rosales v. Bureau of Immigration and Customs Enforcement, 426 F.3d 733, 736 (5th Cir. 2005); Padilla v. Gonzales, 2006 U.S. App. LEXIS 29994 at 9 (7th Cir. 2006); Schmitt v. Maurer, 451 F.3d 1092, 1095 (10th Cir. 2006); Ishak v. Gonzales, 422 F.3d 22, 30 (1st Cir. 2005). The Ninth Circuit, in Alvarez-Barajas, reasoned that conversion to a petition for review would further Congress' intent to make petitions for review in the courts of appeal the sole and exclusive means of judicial review of final orders of deportation or removal and that any other interpretation would lead to absurd results. Alvarez-Barajas, 418 F.3d at 1053.

Here, the Ninth Circuit panel that decided Mr. Almaghzar's case followed Alvarez-Barajas and converted Mr. Almaghzar's pending habeas corpus appeal into a petition for review. Almaghzar, 450 F.3d at 418 n.1; App. 5a. In doing so, the Ninth Circuit failed to follow or consider Supreme Court precedent, which holds that a court's habeas corpus jurisdiction may not be repealed by implication. See INS v. St Cyr, 533 U.S. 289, 298-99 (2001).

In INS v. St. Cyr, the Court considered whether provisions of the Anti-Terrorism and Effective Death Penalty

Act (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) divested district courts of the authority to consider habeas corpus petitions filed pursuant to 28 U.S.C. § 2241 by non-citizens seeking to challenge their administrative removal orders. St. Cyr, 533 U.S. at 298. The Court stated, "[I]mplications from statutory text or legislative history are not sufficient to repeal habeas jurisdiction; instead, Congress must articulate specific and unambiguous statutory directives to effect a repeal." Id. at 299, citing Ex parte Yerger, 75 U.S. 85, 8 Wall. 85, 105, 19 L. Ed. 332 (1869). The Court construed the statutory provisions at issue in St. Cyr in a way that preserved habeas corpus jurisdiction and avoided the difficult Constitutional questions involved in an interpretation that would invoke Congressional authority to suspend the privilege of the writ of habeas corpus. St. Cyr, 533 U.S. at 300-314.

Here, there is no question that Congress did not expressly provide for how a pending habeas corpus petition with the Court of Appeals should be treated. REAL ID Act at § 106(c). The Courts of Appeals' authority to review a decision of a district court to grant or deny a habeas corpus petition is provided by 28 U.S.C. § 2253. Nothing in the REAL ID Act amended or addressed § 2253. As a result, the Court of Appeals erred in interpreting the REAL ID Act in such a way as to divest the Court of Appeals from jurisdiction to review under 28 U.S.C. § 2253 the District Court's denial of Mr. Almaghzar's habeas corpus petition.

Prior to passage of the REAL ID Act, Mr. Almaghzar's only option to challenge the administrative order of removal and denial of his Convention Against Torture claim was to

file a habeas corpus petition in district court. Evidence introduced in the habeas corpus proceedings was subsequently excluded by the Court of Appeals when it chose to treat Mr. Almaghzar's habeas petition as a petition for review. Because Congress did not expressly withdraw the Court of Appeals jurisdiction to consider a habeas corpus petition that was pending before it on the date of enactment of the REAL ID Act, the Court of Appeals retained jurisdiction to consider Mr. Almaghzar's habeas corpus petition and it had no statutory authority to treat the pending habeas corpus appeal as if it were a petition for review. See St. Cyr, 533 U.S. at 314; Felker v. Turpin, 518 U.S. 651, 660-661 (1996).

II. The Court of Appeals' decision to exclude from consideration on appeal evidence presented to the District Court in habeas corpus proceedings violated the Fifth Amendment's guarantee of due process of law.

The Fifth Amendment's Due Process Clause applies to non-citizens who have been administratively ordered deported or removed, as well as those who are contesting their deportation or removal. Zadvydas v. Davis, 533 U.S. 678, 690-93 (2001); Demore v. Kim, 538 U.S. 510, 523 (2003). Appellate review by way of a petition for review is not equivalent to habeas corpus proceedings, which allows for an evidentiary hearing when material facts are in dispute. Faye v. Noia, 372 U.S. 391, 430-31 (1963) ("[A]nd the broad power of the federal courts under 28 U.S.C. § 2243

summarily to hear the application and to "determine the facts, and dispose of the matter as law and justice require," is hardly characteristic of an appellate jurisdiction. Habeas lies to enforce the right of personal liberty; when that right is denied and a person confined, the federal court has the power to release him."); Townsend v. Sain, 372 U.S. 293, 309-12 (1963), ("The whole history of the writ – its unique development – refutes a construction of the federal courts' habeas corpus powers that would assimilate their task to that of courts of appellate review. The function on habeas is different."), reversed on other grounds, Keeney v. Tamayo-Reyes, 504 U.S. 1, 5 (1992). While both Faye and Townsend concerned the right of a state prisoner to petition in federal court for a writ of habeas corpus, the Court did not hold that its reasoning was limited to the state-prisoner context or that habeas corpus jurisprudence is not applicable to any person alleging unlawful detention in violation of the Constitution or laws or treaties of the United States. See 28 U.S.C. § 2241(c)(3). That federal habeas corpus is of fundamental importance in guaranteeing due process of law was expressly and unequivocally affirmed by the Court in Faye v. Noia: "[T] here is nothing novel in the fact that today habeas corpus in the federal courts provides a mode for the redress of denials of due process of law. Vindication of due process is precisely its historic office." Faye v. Noia, 372 U.S. at 402.

Here, by converting Mr. Almaghzar's petition for a writ of habeas corpus into a petition for review, the Court of Appeals limited its review to the administrative record and excluded evidence adduced in the evidentiary hearing conducted by the district court in habeas corpus proceedings.

See Rafaelano v. Wilson, 2006 U.S. App. LEXIS 31300 at 14-15 (9th Cir. 2006) ("When converting habeas petitions into petitions for review, we have consistently reviewed the administrative record and applicable BIA decision, rather than those of the district court."). The evidence offered in the habeas corpus proceedings included expert opinion evidence in the form of a psychological evaluation of Mr. Almaghzar, which confirmed that he is suffering from severe post-traumatic stress disorder caused by the torture and abuse that he suffered in Yemen. App. 44a. This evidence, which was excluded from consideration by the Court of Appeals, was critically important to Mr. Almaghzar's application for protection under the Convention Against Torture because it helped to explain inconsistencies in his prior testimony; corroborated the psychological evaluation that had previously been discredited by the Immigration Judge and provided support for the likelihood that Mr. Almaghzar would be tortured if returned to Yemen. In addition, a second expert opinion's assessment of the current political situation in Yemen and the likelihood that Mr. Almaghzar would be tortured if returned to Yemen was submitted to the district court in the habeas proceedings and was not a part of the administrative record.

The touchstone of due process of law is fundamental fairness, and fundamental fairness requires the Court of Appeals to consider all of the evidence that was before the district court when it decided Mr. Almaghzar's petition for writ of habeas corpus. See Townsend, 372 U.S. at 312 (The power of inquiry on federal habeas corpus is plenary, and the opportunity to be heard, to argue and to present evidence,

must never be totally foreclosed); Goldberg v. Kelly, 397 U.S. 254, 271 (1970) (A fundamental requirement of Due Process is that decisions are based on the legal rules and the evidence adduced at a hearing). Without the ability to hear evidence and decide the facts, a habeas court loses the inherent power necessary to vindicate the writ. In habeas corpus proceedings, the Court of Appeals is not strictly limited to the administrative record, as it would be when considering a petition for review, and due process of law requires it to consider the evidence before it when deciding the facts and determining whether or not to grant the writ. Townsend, 372 U.S. at 312 ("It is the typical, not the rare, case in which constitutional claims turn upon the resolution of contested factual issues").

III. Section 106(a) of the REAL ID Act violates the Suspension clause of the United States Constitution because it completely deprives Petitioner of the right to petition any court for a writ of habeas corpus.

By its express terms, section 106(a) of the REAL ID Act eliminates the right to petition for a writ of habeas corpus for a non-citizen seeking review of an order of removal or a claim made under the United Nations Convention Against Torture. 8 U.S.C. §§ 1252(a)(4) and (5).

Article I, section 9 of the United States Constitution states, in pertinent part, [T]he privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." U.S. Const. art. I, § 9, cl. 2.

In St. Cyr, the Court held that "at the absolute minimum, the Suspension Clause protects the writ as it existed in 1789." St. Cyr, 533 U.S. at 301 (internal quotations and citations omitted). The Court interpreted the statutory provisions at issue there in a way that did not require identifying the full scope of habeas corpus proceedings in 1789 or, if the Suspension Clause should be interpreted to protect something more than the historical minimum. St. Cyr, 533 U.S. at 314.

In Demore v. Kim, Justice O'Connor's concurring opinion addressed the Suspension Clause analysis to be utilized for a non-citizen challenging his detention pending deportation proceedings in terms of whether the writ of habeas corpus would have been an available remedy in 1789. Demore v. Kim, 538 U.S. 510, 537-38 (2003) (O'Connor, J. concurring). Thus, presumably, the question here, in Justice O'Connor's view, would be whether an evidentiary hearing could have been conducted in habeas corpus proceedings in 1789. If so, the Suspension Clause is implicated by the REAL ID Act's express repeal of habeas corpus jurisdiction. If not, and if the Suspension Clause protects nothing more than the absolute minimum scope of the writ of habeas corpus, as it existed in 1789, the Suspension Clause would not be offended.

In St. Cyr, the Court examined the history of habeas corpus proceedings and postulated the type of legal questions that could have been raised and considered in habeas corpus proceedings in 1789. St.Cyr, 533 U.S. at 301-304. The Court did not specifically discuss habeas corpus procedures and whether an evidentiary hearing was available to a petitioner in 1789; however, as early as 1807, the Court

reviewed evidence proffered in habeas corpus proceedings to determine if there were grounds for issuing the writ. See Ex parte Bollman, 8 U.S. 75, 128-131 (1807). More generally, the Court has repeatedly recognized that the power of a federal court in habeas proceedings is plenary, and this power necessarily includes the authority to hold an evidentiary hearing in order to determine contested facts material to the question under consideration. Townsend, 372 U.S. at 311 (In reference to state prisoners detained unconstitutionally, "this Court has consistently upheld the power of the federal courts on habeas corpus to take evidence relevant to claims of such detention); Fay v. Noia, 371 U.S. at 405 ("Thus, at the time that the Suspension Clause was written into our Federal Constitution and the first Judiciary Act was passed conferring habeas corpus jurisdiction upon the federal judiciary, there was respectable common-law authority for the proposition that habeas was available to remedy any kind of governmental restraint contrary to fundamental law").

The Court has recognized that where Congress provides an adequate alternative forum the constitutional question can be avoided. St. Cyr, 538 U.S. at 314 ("If it were clear that the question of law could be answered in an alternative forum, it might be permissible ..."). But here, the conversion of a petition for writ of habeas corpus into a petition for review results in the exclusion of all evidence introduced in the habeas corpus proceedings and limits the Court of Appeals to the administrative record. Bonhometre v. Gonzales, 414 F.3d 442, 446 (3rd Cir. 2005); Rafaelano v. Wilson, 2006 U.S. App. LEXIS 31300 at 15. As a result, it is not an adequate alternative remedy. The Court, in Townsend,

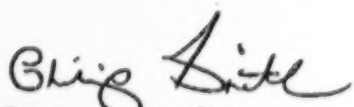
by explaining when habeas corpus actually requires an evidentiary hearing, has already determined that habeas corpus is not merely a form of appeal. Townsend, 372 U.S. at 311-12. Because review by way of a petition for review in the Court of Appeals is not an adequate substitute for habeas corpus proceedings and because the public safety does not require it, section 106(a) of the REAL ID Act violates the Suspension Clause of the United States Constitution.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that his Petition for Writ of Certiorari be granted.

January 22, 2007

Respectfully submitted,



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APPENDIX

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ABDUL R. ALMAGHZAR, Petitioner-Appellant, v. ALBERTO R. GONZALES, Attorney General, Respondent-Appellee.

No. 04-35863

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

457 F.3d 915; 2006 U.S. App. LEXIS 19614

September 12, 2005, Argued and Submitted, Portland, Oregon
August 3, 2006, Decided
June 8, 2006, Filed

Appeal from the United States District Court for the District of Oregon. D.C. No. CV-04-01888-PA. Owen M. Panner, Senior Judge, Presiding. Almaghzar v. Gonzales, 450 F.3d 415, 2006 U.S. App. LEXIS 14069 (9th Cir. Or., 2006)

COUNSEL: Philip James Smith, Portland, Oregon, for petitioner-appellant Abdul R. Almaghzar.

Kenneth C. Bauman, Assistant United States Attorney, Portland, Oregon, for respondent-appellee Alberto Gonzales, Attorney General.

JUDGES: Before: Raymond C. Fisher, Ronald M. Gould, and Carlos T. Bea, Circuit Judges. Opinion by Judge Gould; Partial Concurrence and Partial Dissent by Judge Fisher.

OPINION BY: Ronald M. Gould

OPINION: [*917] ORDER AMENDING OPINION AND AMENDED OPINION

ORDER

Respondent's Unopposed Request for Modification of the Decision is GRANTED. The opinion filed on June 8, 2006, and published at 450 F.3d 415 (9th Cir. 2006), is AMENDED as follows.

On page 422 of the opinion, the first paragraph under the subheading "B. The Merits of Almaghzar's CAT Claim" begins as follows:

> To receive the protection of the CAT, an alien must prove that it is more likely than not that the alien would be tortured if removed. 8 C.F.R. § 208.16(c)(2). An alien must establish that he or she would be tortured on account of a particular belief or immutable characteristic. *Kamalthas*, 251 F.3d at 1283. Because this a factual determination, the substantial evidence test governs our review. *Monjaraz-Munoz*, 327 F.3d at 895.

The second sentence of that paragraph is deleted, and the citation to *Kamalthas* is moved to follow the citation to 8 C.F.R. § 208.16(c)(2), so that the final paragraph now begins as follows:

> To receive the protection of the CAT, an alien must prove that it is more likely than not that the alien would be tortured if removed. 8 C.F.R. § 208.16(c)(2); *Kamalthas*, 251 F.3d at 1283. Because this is a factual determination, the substantial evidence test governs our review. *Monjaraz-Munoz*, 327 F.3d at 895.

IT IS SO ORDERED.

OPINION

GOULD, Circuit Judge:

Petitioner-Appellant Abdul Almaghzar (Almaghzar), a native and citizen of Yemen, appeals the district court's denial of his petition for a writ of habeas corpus. We construe his petition as a timely filed petition for review of a decision of the Board of Immigration Appeals (BIA). n1 In his petition Almaghzar contends [*918] (1) that the frivolous asylum application bar was erroneously applied to his asylum application, (2) that the Immigration Judge (IJ) incorrectly disregarded testimony that explained discrepancies in Almaghzar's testimony, (3) that Almaghzar was not allowed to present a claim under the Convention Against Torture (CAT), n2 (4) that Almaghzar's hearing violated his right to

due process under the Fifth Amendment, n3 and (5) that the IJ erred in concluding that Almaghzar's two prior criminal convictions were particularly serious crimes. In its reasoned opinion the BIA rejected these arguments, and we affirm.

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n1 After Almaghzar filed his habeas petition in the district court, and after the district court denied Almaghzar's petition, Congress enacted the REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231. Section 106(a) of that Act makes "the circuit courts the 'sole' judicial body able to review challenges to final orders of deportation, exclusion, or removal." *Alvarez-Barajas v. Gonzales*, 418 F.3d 1050, 1052 (9th Cir. 2005). The REAL ID Act eliminates habeas jurisdiction under 28 U.S.C. § 2241 over final orders of deportation, exclusion, and removal. *Alvarez-Barajas*, 418 F.3d at 1052. The Act requires that all habeas petitions pending before the district courts at the time of enactment be transferred to the circuit courts, but it is silent about how habeas petitions then pending on appeal before the circuit courts should be treated. *Id.* at 1053. In *Alvarez-Barajas* we held that any such petition "should be construed as if it were a timely filed petition for review with this court." *Id.* Applying this precedent, we conclude that the substantive and procedural provisions of the REAL ID Act govern Almaghzar's claims.

n2 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988),1465 U.N.T.S. 85.

n3 The Fifth Amendment reads, in relevant part, "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. V.

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I

Almaghzar arrived in the United States from Yemen in November of 1992. Almaghzar filed a Request for Asylum dated December 9, 1992, in which he gave an Anaheim, California, address. In his asylum application, Almaghzar stated that if forced to return to Yemen he feared persecution from pro-Communist forces there. The Immigration and Naturalization Service (INS) denied Almaghzar's application in March of 1994. Thereafter Almaghzar retained counsel, and his case was reopened and remained pending until 1998. Sometime between 1994 and 1998 Almaghzar moved to Oregon. n4 In April of 1997 he married a U.S. citizen and filed an adjustment application. Before Almaghzar's application could be processed the marriage dissolved, and in 1998 the INS initiated removal proceedings against Almaghzar in Portland. At a hearing before the IJ on September 13, 1998, Almaghzar agreed to submit his original asylum application, which was then still pending in California, to the Immigration Court in Oregon. The parties disagree whether this submission was a new application for asylum, or was a transfer of Almaghzar's then-pending

application.

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n4 The record does not indicate when Almaghzar moved to Oregon. His 1992 Request for Asylum listed an Anaheim, California address, the adjustment application that Almaghzar filed after he married a U.S. citizen is not in the record, and the record does not tell us where Almaghzar lived between 1994 and 1998.

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On November 13, 1998, the IJ denied Almaghzar's application for asylum and withholding of removal because the IJ found that Almaghzar was not credible, and the IJ ordered Almaghzar removed to Yemen. Further, the IJ found that Almaghzar had filed a frivolous asylum application and that, as a result, he was "permanently ineligible for any benefits" under the Immigration and Nationality Act. 8 U.S.C. § 1158(d)(6). The IJ found that Almaghzar was not credible, in part because Almaghzar had told two different tales about his treatment in Yemen. n5 At the time of the IJ's decision, relief under [*919] the CAT was not available because Congress had not yet implemented the provisions of the CAT prohibiting the return of aliens to countries where they would be in danger of suffering torture. n6

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N5 The discrepancies between his stories need not be recounted, because Almaghzar does not argue that the IJ erred in determining that the stories were inconsistent to the

point that they were not credible. Nor does he contend that translation errors caused the inconsistencies. Although Almaghzar testified at his second hearing and claimed before the BIA that his affidavit and the transcript of his first hearing contained translation errors, he does not press this claim on appeal. Rather, he argues that testimony at a later hearing by Dr. Givi, a licensed clinical psychologist, explains the inconsistencies.

n6 The United States ratified the CAT in 1994. Congress implemented Article 3 of the CAT on October 21, 1998, with the Foreign Affairs Reform and Restructuring Act of 1998. Pub. L. No. 105-277, § 2242, 112 Stat. 2681-822 (codified at 8 U.S.C. § 1231 note).

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Almaghzar appealed the IJ's decision to the BIA, but while his case was pending on that appeal he was charged by the United States with one count of fraudulently trading food stamps for methamphetamine in violation of 7 U.S.C. § 2024(b) and with one count of knowingly and intentionally distributing methamphetamine in violation of 21 U.S.C. § 841(a)(1). n7 He pled guilty to both charges on July 27, 2000, and on October 2, 2000, Almaghzar was sentenced to thirty-seven months in federal prison. After serving his sentence he was released into the custody of the INS and detained pursuant to 8 U.S.C. § 1226(c)(1)(B). n8 The INS notified the BIA that Almaghzar had been convicted of distribution of methamphetamine, and the BIA construed this notice as a request for remand to the IJ, which the BIA granted.

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n7 The indictment, filed March 1, 2000, charged Almaghzar with three counts of using "a food benefit authorization card in a manner not authorized by law" and three counts of "unlawfully and intentionally distribut[ing] methamphetamine, a schedule II controlled substance, in violation of Title 21, United States Code, Section 841(a)(1)." In a superseding information filed on June 29, 2000, the U.S. Attorney charged Almaghzar with one count of using a food benefit authorization card in connection with the delivery of methamphetamine in violation of 7 U.S.C. § 2023(b), and with one count of distributing methamphetamine in violation of 21 U.S.C. § 841(a)(1).

n8 This statute provides, in relevant part, "The Attorney General shall take into custody any alien who . . . is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii), (A)(iii),(B), (C), or (D)." 8 U.S.C. § 1226(c)(1)(B).

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The IJ, who had last conducted proceedings in this case in November 1998, then held another hearing on June 30, 2003. Almaghzar called as a witness Dr. Givi, a licensed clinical psychologist, in an effort to rehabilitate Almaghzar's earlier testimony that had been discredited by the IJ. Dr. Givi explained that as the basis for his testimony he had interviewed and observed Almaghzar, conducted "a large number of assessments," and reviewed documents from Almaghzar's attorney, including Almaghzar's pre-hearing statement, his Request for Asylum, his affidavit, the oral

decision of the IJ, and Almaghzar's brief on appeal to the BIA.

Dr. Givi testified that Almaghzar suffered from post-traumatic stress disorder stemming from imprisonment and torture in Yemen and from sexual abuse suffered at a young age. Dr. Givi also testified that post-traumatic stress disorder often impairs memory and the ability to concentrate, and that these symptoms explained the inconsistencies in Almaghzar's prior testimony. Although Dr. Givi was aware of Almaghzar's conviction for distributing methamphetamine, Dr. Givi was not aware of Almaghzar's conviction for food stamp fraud. For this reason, the IJ disregarded Dr. Givi's testimony, concluding that Almaghzar's fraud conviction for his role in a complex criminal enterprise in which he had sold methamphetamine for food stamps was inconsistent with Dr. Givi's opinion that Almaghzar was incapable of complex, non-linear thinking.

At the same hearing Almaghzar offered evidence in support of his CAT claim, including reports detailing that torture does occur in Yemen. Almaghzar also testified at the hearing, offering an account of his [*920] activities in Yemen that differed from both Almaghzar's affidavit and his testimony at his first hearing. The IJ denied Almaghzar's request for asylum and for withholding of removal, found that Almaghzar had filed a frivolous application for asylum, found that Almaghzar had no valid claim under the CAT, and ordered Almaghzar removed to Yemen. Almaghzar appealed to the BIA, which affirmed the IJ's decision.

II

On a petition for review, the BIA's decisions regarding purely legal questions are reviewed de novo, "giving deference to the BIA's interpretation unless that interpretation is contrary to the plain and sensible meaning of the statute." *Simeonov v. Ashcroft*, 371 F.3d 532, 535 (9th Cir. 2004). BIA decisions regarding whether an alien is eligible for asylum must be affirmed if supported by substantial evidence. *Karouni v. Gonzales*, 399 F.3d 1163, 1170 (9th Cir. 2005). "We review the BIA's findings of fact, including credibility findings, for substantial evidence and must uphold the BIA's finding unless the evidence compels a contrary result." *Monjaraz-Munoz v. INS*, 327 F.3d 892, 895 (9th Cir. 2003). Congress has codified this deferential standard of review. *See* 8 U.S.C. § 1252(b)(4)(B) ("[T]he administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude the contrary.").

III

We first address Almaghzar's challenge to the IJ's determination that the frivolous asylum application bar applied in this case. The frivolous asylum application bar, *id.* § 1158(d)(6), renders an alien permanently ineligible for immigration benefits if his or her asylum application is found to be knowingly frivolous. The statute requires that an asylum applicant receive notice of the consequences of filing a frivolous application. *Id.* § 1158(d)(4)(A). n9 Under the regulations implementing the frivolous asylum application

bar, an application is frivolous "if any of its material elements is deliberately fabricated." 8 C.F.R. § 1208.20. The regulations require that a finding of frivolousness "only be made if the immigration judge or the Board is satisfied that the applicant, during the course of the proceedings, has had sufficient opportunity to account for any discrepancies or implausible aspects of the claim." *Id.* The frivolous asylum application bar applies to asylum applications filed on or after April 1, 1997. *Id.* Almaghzar does not challenge the substantive determination that his asylum application was frivolous. Rather, he argues that, because he filed his application in 1992, the frivolous asylum application bar does not apply to him. The parties dispute whether, in submitting his application to the Immigration Court in Oregon in 1998, Almaghzar filed a new application or instead transferred his application that was then pending in California.

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n9 Almaghzar does not dispute that he received notice of the consequences of filing a frivolous asylum application as required by 8 U.S.C. § 1158(d)(4)(A).

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Aliens seeking judicial review of a final order of removal must first exhaust all available administrative remedies. 8 U.S.C. § 1252(d)(1). While before the IJ, Almaghzar never claimed to have filed his asylum application before the frivolous asylum application bar took effect - not even when the IJ warned him about the frivolous asylum application bar's potential applicability and asked whether,

notwithstanding that risk, he wanted to proceed with his application. Nor did Almaghzar [*921] raise the timing issue when he challenged the IJ's application of the bar before the BIA. Accordingly, we hold that Almaghzar has not exhausted his claim that he filed his application before the frivolous asylum application bar took effect, and we decline to review this claim.

IV

We do not address whether the frivolous asylum application bar precludes a claim under the CAT because that was not the basis upon which the IJ and the BIA denied relief on Almaghzar's CAT claim. *See SEC v. Chenery Corp. (Chenery II)*, 332 U.S. 194, 199, 67 S. Ct. 1575, 91 L. Ed. 1995 (1947) ("[A] reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency."). Instead, we review the BIA's determination that Almaghzar did, in fact, have an opportunity to present a CAT claim, and its determination that Almaghzar's CAT claim lacked merit. Almaghzar contends that both of these conclusions are in error, arguing that his second hearing was plagued by due process violations and that the substantive determination that he was not entitled to CAT relief is incorrect. We address these arguments in turn.

A. Almaghzar's Due Process Claims

Almaghzar claims that he suffered various violations of his due process rights during his second hearing before the IJ. We address each of Almaghzar's contentions below.

First, Almaghzar asserts that the IJ prevented Almaghzar from presenting evidence to support his claim under the CAT. However, the transcript of the hearing shows that Almaghzar was allowed to present evidence in support of his CAT claim. Dr. Givi testified about his psychological evaluation of Almaghzar, Almaghzar presented several reports describing torture in Yemen, and Almaghzar testified at length about the inconsistencies in his prior testimony, his activities in Yemen, and his asylum application. Because Almaghzar was allowed to present evidence regarding his CAT claim, and because Almaghzar's presentation was not limited in any meaningful respect, we reject Almaghzar's due process claim.

Almaghzar's second claim is that his right to due process was violated when the IJ allowed the adverse credibility determination to dictate the outcome of the CAT claim. Under *Kamalthas v. INS*, 251 F.3d 1279 (9th Cir. 2001), claims under the CAT are analytically separate from an application for asylum. *Id.* at 1283. The *Kamalthas* court held that the BIA abused its discretion when it refused to reopen Kamalthas's case, which presented a new CAT claim, when Kamalthas's asylum application had previously been denied because Kamalthas was found not credible. *Id.* at

1280. Because the elements of a CAT claim are different from a claim for asylum, the *Kamalthas* court held that the BIA erred in relying on its previous adverse credibility determination and in refusing to consider documentary evidence of torture in Kamalthas's native Sri Lanka, thus denying Kamalthas the opportunity to make a prima facie case. *Id.* at 1284.

Here, there was no denial of consideration of the documentary evidence. Almaghzar presented additional information supporting his CAT claim, including reports detailing human rights abuses in Yemen. *Kamalthas* requires that an applicant be given the opportunity to make a claim under the CAT by introducing documentary evidence of torture, but neither *Kamalthas* nor due process requires an IJ to rely on that evidence to grant relief [*922] when the applicant is not credible. Further, the IJ specifically said that "[t]he Court has considered all of the evidence, documentary and testimonial, whether or not I specifically mention it here," and the IJ concluded that there was "no basis to find a Convention Against Torture claim." We do not interpret or extend *Kamalthas* to require more.

Third, Almaghzar challenges the determination that Dr. Givi was not credible. This factual determination may be overturned only if the evidence compels a contrary result. *Monjaraz-Munoz*, 327 F.3d at 895. The IJ discounted Dr. Givi's testimony after discovering that Dr. Givi did not know of Almaghzar's conviction for a scheme in which Almaghzar had distributed methamphetamine for food stamps; the IJ

concluded that Almaghzar's conviction was inconsistent with Dr. Givi's contention that Almaghzar was incapable of "functioning in a linear fashion." The evidence does not compel the conclusion that Dr. Givi's testimony was credible, and we therefore will not reverse the IJ's negative credibility determination.

Fourth, Almaghzar claims that the IJ did not consider the documentary evidence of torture in Yemen. The IJ did not specifically discuss the documentary evidence in his oral decision, apart from his general statement that he had considered all documentary and testimonial evidence, whether or not discussed. Almaghzar attacks this as "boiler plate" language, arguing that the evidence should have received "individualized consideration" as required by 8 C.F.R. § 1208.16(c)(3). That regulation, however, does not require an IJ's decision to discuss every piece of evidence; it requires only that the IJ consider all evidence. *Id.* § 1208.16(c)(3). Because there is no evidence that the IJ failed to consider Almaghzar's documentary evidence, we accept the IJ's general statement that he considered all the evidence before him.

Finally, Almaghzar claims that the IJ conducted the second hearing in a partisan matter. He compares the IJ's conduct during the hearing to that of the IJ in *Colmenar v. INS*, 210 F.3d 967 (9th Cir. 2000), who refused to let Colmenar testify about certain critical aspects of his claims. *Id.* at 972. Even though Almaghzar's IJ expressed skepticism about how Dr. Givi's testimony could provide insight on the credibility

determination, the IJ allowed Dr. Givi to testify. This distinguishes Almaghzar's claim from that presented in *Colmenar*. Although the IJ showed impatience at times, Almaghzar had ample opportunity to present his case, and the record as a whole does not suggest that the IJ did not conduct the hearing with an open mind.

In sum, the IJ did not violate Almaghzar's due process rights during the second hearing.

B. The Merits of Almaghzar's CAT Claim

To receive the protection of the CAT, an alien must prove that it is more likely than not that the alien would be tortured if removed. 8 C.F.R. § 208.16(c)(2); *Kamalthas*, 251 F.3d at 1283. Because this is a factual determination, the substantial evidence test governs our review. *Monjaraz-Munoz*, 327 F.3d at 895. The evidence supporting Almaghzar's claim is his discredited testimony and general reports indicating that torture occurs in Yemen. Because Almaghzar's testimony was found not credible, to reverse the BIA's decision we would have to find that the reports alone compelled the conclusion that Almaghzar is more likely than [*923] not to be tortured. n10 Although the reports confirm that torture takes place in Yemen, they do not compel the conclusion that Almaghzar would be tortured if returned. Therefore, we defer to the IJ and BIA's determination that relief under the CAT is unavailable. n11

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n10 Jon E. Mandaville, a professor in the History Department and Middle East Studies Center at Portland State University, testified before the district court that Almaghzar was likely to be tortured upon his return to Yemen. Because we now review the BIA decision, rather than the district court decision, it is questionable whether this testimony is properly before us. However, assuming without deciding that this testimony is before us, we find it unhelpful. Professor Mandaville explicitly conditioned his conclusion that Almaghzar is likely to be tortured upon his return on the assumption that Almaghzar's testimony was truthful, which the IJ found not to be the case.

n11 The dissent argues that we should remand Almaghzar's CAT claim to the BIA under *INS v. Ventura*, 537 U.S. 12, 123 S. Ct. 353, 154 L. Ed. 2d 272 (2002) (per curiam), and *Gonzales v. Thomas*, 126 S. Ct. 1613, 164 L. Ed. 2d 358 (2006) (per curiam), because the dissent claims that we are deciding Almaghzar's CAT claim in the first instance. *Ventura* and *Thomas* require that we remand when the agency has not yet considered the issue. *See Thomas*, 126 S. Ct. at 1615; *Ventura*, 537 U.S. at 17. But we here hold that the IJ and BIA decided the merits of Almaghzar's CAT claim, with the benefit of the country condition reports Almaghzar introduced into evidence, and the IJ generally said that he had considered all evidence. Neither *Ventura* nor *Thomas* require us to remand an issue to the agency when the agency has already considered the issue.

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V

We are without jurisdiction to review Almaghzar's claim that the IJ erred in concluding that Almaghzar's felony convictions constituted particularly serious crimes that bar him from withholding of removal. "[N]o court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section 1182(a)(2) . . . ." 8 U.S.C. § 1252(a)(2)(C).

Nevertheless, we may review claims that an applicant's constitutional rights were violated. *Id.* § 1252(a)(2)(D). Almaghzar argues that his Fifth Amendment right to due process was violated when the IJ disregarded Dr. Givi's testimony, did not permit Almaghzar to testify about the circumstances surrounding his criminal conviction, and conducted the hearing in a partisan, adversarial manner. As discussed in the previous section, Almaghzar was allowed to present the testimony of Dr. Givi, Almaghzar's ability to present evidence was not impaired in any way, and the IJ conducted the hearing in a fair manner. We reject Almaghzar's due process challenge to the IJ's determination that Almaghzar's crimes were particularly serious.

VI

Almaghzar fails to present this court with evidence that compels the conclusion that the IJ and BIA erred in finding that Almaghzar and Dr. Givi were not credible. Furthermore,

Almaghzar's due process claims are without merit, as it is clear on the record that he had ample opportunity to present his CAT and asylum claims, and that the IJ was not biased. Accordingly, treating Almaghzar's habeas petition in the district court as a petition for review of the BIA decision, we agree with the denial of relief by the BIA, and the petition for review is hereby denied.

PETITION FOR REVIEW DENIED.

CONCUR BY: Raymond C. Fisher (In Part)

DISSENT BY: Raymond C. Fisher (In Part)

DISSENT:

[*924] FISHER, Circuit Judge, concurring in part and dissenting in part:

Both the immigration judge (IJ) and the Board of Immigration Appeals (BIA) completely ignored our standards for adjudicating Convention Against Torture (CAT) claims as explicated in *Kamalthas v. INS*, 251 F.3d 1279 (9th Cir. 2001). The IJ committed two interrelated errors, neither of which the BIA corrected. First, the IJ uncritically imported the adverse credibility determination from the asylum context into the CAT context. Second, the IJ failed to articulate with any specificity why the country conditions evidence of

torture in Yemen, along with the other evidence in the record, did not suffice to establish Almaghzar's CAT claim. Accordingly, although I concur in most of the other aspects of the majority's opinion, n1 I respectfully dissent from the majority's holdings regarding Almaghzar's CAT claim and would remand that claim to the BIA for reevaluation in light of Yemeni country conditions evidence.

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n1 Although I ultimately concur in the majority's result with respect to Almaghzar's allegations of a denial of due process because of the IJ's partiality during the 2003 hearing, I do not endorse the IJ's hostility, especially as directed towards Almaghzar's expert witness, Dr. Givi. The IJ made a snide comment about Dr. Givi being an expert in lying, blew up at Dr. Givi and badgered him on the stand without permitting him to answer the IJ's questions and implied that Dr. Givi was testifying on behalf of Almaghzar because of their shared Middle Eastern ethnicity. This behavior constituted more than mere "impatience," (op. at 8869); it was abusive and unprofessional.

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Two years before Almaghzar's 2003 hearing, *Kamalthas* held that "a claim under the Convention [Against Torture] is not merely a subset of claims for either asylum or withholding of removal," but rather is an "analytically separate" claim. 251 F.3d at 1283. In a passage particularly relevant to the IJ's treatment of Almaghzar's CAT claim, *Kamalthas* stated that "[w]e are not comfortable with allowing a negative

credibility determination in the asylum context to wash over the torture claim . . . ." *Id.* at 1284 (quoting *Mansour v. INS*, 230 F.3d 902, 908 (7th Cir. 2000)). *Kamalthas* further held that the BIA's failure to consider country reports attesting to the likelihood that the petitioner would be tortured if removed to Sri Lanka was reversible error and vacated the BIA's denial of a motion to reopen the petitioner's case. *See id.* "[T]he Board abuse[s] its discretion in failing to recognize that country conditions *alone* can play a decisive role in granting relief under the Convention." *Id.* at 1280 (emphasis added).

The similarities between this case and *Kamalthas* are striking. As the majority acknowledges, "[t]he IJ did not specifically discuss the documentary evidence [of torture in Yemen] in his oral decision." (Op. at 8869.) Neither did the BIA; indeed, the BIA did nothing more than note that Almaghzar had appealed the IJ's CAT ruling and then went on to summarily deny that portion of his appeal. n2 Further, just as [*925] in *Kamalthas*, the IJ in this case "plainly over relied on [his] prior adverse credibility finding." 251 F.3d at 1284. The IJ's only discussion of Almaghzar's CAT claim was a reiteration of all of the reasons he found Almaghzar not to be credible on his asylum claim:

> I also find that there's no basis to consider a claim under the Convention Against Torture because frankly, with the variety of stories that the Respondent has told, the misleading nature of his presentation about himself to the psychologist taken together with the fraud

> conviction that he has as well as the distribution of methamphetamine which was part and parcel to those fraud operations, that the Court does not place any credibility on any of the claims whatsoever. So there would be no basis to find a Convention Against Torture claim.

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n2 As in *Kamalthas*, the BIA did not just affirm the IJ, but wrote an opinion. Accordingly, we are bound to review the BIA's opinion in the first instance rather than the IJ's ruling. *See* Albathani v. INS, 318 F.3d 365, 373 (9th Cir. 2003) ("Ordinarily, Courts of Appeals review decisions of the [BIA], and not those of an IJ.") (quoting Gao v. Ashcroft, 299 F.3d 266, 271 (3d Cir. 2002)). However, in this case, the BIA's utter lack of analysis on the CAT issue leaves us no choice but to consider the IJ's reasoning with respect to the CAT claim in order to understand the BIA's reasons for affirming. *Cf.* Avetova-Elisseva v. INS, 213 F.3d 1192, 1197 (9th Cir. 2000) ("[T]he BIA's . . . phrasing seems in part to suggest that it did conduct an independent review of the record. . . . But the lack of analysis that the BIA opinion devoted to the issue at hand - its simple statement of a conclusion - also suggests that the BIA gave significant weight to the IJ's findings. In light of that ambiguity, we will also look to the IJ's oral decision as a guide to what lay behind the BIA's conclusion.") (internal citation omitted).

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Kamalthas explicitly held that the BIA cannot deny relief "without recognizing the proper standard for establishing a prima facie case and giving weight to relevant country conditions," *id.*; and it abuses its discretion" when it fail[s] to state its reasons and show proper consideration of all factors when weighing equities and denying relief,"*id.* (quoting *Arrozal v. INS*, 159 F.3d 429, 432 (9th Cir. 1998)). Both the IJ and the BIA failed to recognize and apply the appropriate and distinct CAT standard, to consider relevant country conditions and to state their reasons why those conditions did not support Alamghzar's claim that he could be tortured if returned to Yemen. Instead, both the IJ's and the BIA's rejections of Almaghzar's CAT claim were based solely on the IJ's asylum credibility findings. The majority errs in affirming these clear failures to abide by *Kamalthas*' mandates.

Almaghzar's credibility is highly suspect - like that of young Mr. Kamalthas - and he may not be entitled to CAT relief on the merits *even if* Yemeni country reports and Dr. Givi's testimony regarding post-traumatic stress disorder are credited. Nonetheless, notwithstanding "the high bar to obtaining relief under the Convention on the merits," *Kamalthas* refused to rely on a CAT petitioner's weighty burden of proof to justify a harmless error approach to the BIA's lack of consideration of country conditions evidence. *See id.* "Indeed, proper attention to relevant country conditions might lend credence to [petitioner's] assertions of torture and cause the BIA to view them in a different light." *Id.*

Given that the Yemeni country conditions evidence in the record paints a bleak picture, the BIA's assessment of Almaghzar's CAT claim might well be similarly influenced here. The 2002 Human Rights Watch country report on Yemen states that "[t]he security forces continued to exercise wide powers and to commit abuses, including arbitrary arrest, torture, and killings of civilians with virtual impunity." The 2002 Amnesty International country report states that "[t]orture and a death in custody were reported." And the 2002 United States State Department country report states that "[m]embers of the security forces tortured and otherwise abused persons, and continued to arrest and detain citizens arbitrarily."

In any event, because neither the IJ nor the BIA addressed Yemen's country conditions, we have no idea how either the IJ or the BIA evaluated those conditions as applied to Almaghzar; all we know is that [*926] they thought him to be not credible based on his asylum-related testimony. That is not enough, per *Kamalthas*.

The majority reasons that "[b]ecause Almaghzar was allowed to present evidence regarding his CAT claim, and because Almaghzar's presentation was not limited in any meaningful respect, we reject Almaghzar's due process claim." (Op. at 8867-68.) But there is a difference between merely allowing evidence to be presented and actually considering it. This distinction animates the rationale for reviewing an IJ's decision when the BIA affirms without opinion - there is no

BIA reasoning for us to review in such cases. *Cf.* Garrovillas v. *INS*, 156 F.3d 1010, 1013 (9th Cir. 1998) ("The BIA's opinion, however, cannot be mere boilerplate, and must describe with sufficient particularity and clarity the reasons for denial of asylum.") (internal quotations omitted). Indeed in this case, there is *no* BIA reasoning for us to review on Amaghzar's CAT claim, and the IJ's reasoning on CAT consists *solely* of the conclusion that Almaghzar is not eligible for relief. It is hard to see how we can exercise our duty to perform any sort of meaningful review of the BIA's or the IJ's decisions if they simply assure us that they considered everything they were legally obligated to consider. n3

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n3 In other contexts, we have been quite clear that there is a distinction between considering something and merely stating a conclusion. *See, e.g.*, United States v. Howell, 231 F.3d 615, 621, 622 (9th Cir. 2000) ("[I]n making a decision on whether to consider newly offered evidence, the district court must actually exercise its discretion, rather than summarily accepting or denying the motion.").

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Next, the majority rejects Almaghzar's argument regarding the IJ's use of boilerplate language because "8 C.F.R. § 1208.16(c)(3). . . does not require an IJ's decision to discuss every piece of evidence; it requires only that the IJ consider all evidence." (Op. at 8869.) I find this argument unpersuasive and inconsistent with our case law. In the

asylum context, 8 C.F.R. § 1208.13 plays a role analogous to that of 8 C.F.R. § 1208.16(c) in the CAT context; both elaborate procedures for the respective claims for relief. And just like § 1208.16(c), § 1208.13 by its terms does not require that "an IJ's decision . . . discuss every piece of evidence." n4 (Op. at 8869.) Yet this court has repeatedly held that in the asylum context,

> [t]he BIA must have a legitimate articulable basis to question the petitioner's credibility, and must offer a specific, cogent reason for any stated disbelief. Furthermore, any such reasons must be substantial and bear a legitimate nexus to the finding. Generalized statements that do not identify specific examples of evasiveness or contradiction in the petitioner's testimony prevent us from conducting a proper review.

Garrovillas, 156 F.3d at 1013 (internal citations and quotations omitted); *see also Zahedi v. INS*, 222 F.3d 1157, 1163 (9th Cir. 2000); *Lopez-Galarza v. INS*, 99 F.3d 954, 963 (9th Cir.1996) ("We note that at a minimum, the BIA must provide an explanation sufficient to enable us as a reviewing court to see that the Board has heard, considered, and decided.") (internal citations and quotation marks omitted). The majority gives no reasons why a CAT claim denial should be treated with so much deference - taking the IJ at his word [*927] that he considered all the evidence - while the denial of an asylum claim is scrutinized for specific, cogent

reasons. The text of the respective regulations does not justify this divergent result.

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n4 In fact, § 1208.13 does not appear to include an analogue to § 1208.16(c)(3)'s directive that "all evidence relevant to the possibility of future torture shall be considered." However, the REAL ID Act's revision of 8 U.S.C § 1158(b)(1) now instructs the trier of fact in asylum proceedings to "consider[] the totality of the circumstances" when making a credibility determination. 8 U.S.C § 1158(b)(1)(B)(iii) (2006).

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The majority also states that "[b]ecause there is no evidence that the IJ failed to consider Almaghzar's documentary evidence, we accept the IJ's general statement that he considered all the evidence before him." (Op. at 8869.) But even if we credit the IJ's cursory statement that he had "considered all of the evidence, documentary and testimonial, whether or not . . . specifically mention[ed]" in his opinion, that statement does not satisfy the standard of review for CAT claims established in *Kamalthas*. Boilerplate rejections of CAT claims are not legally sufficient.

Kamalthas explicitly imported the abuse of discretion standard from the deportation (now removal) context into considerations of CAT claims: "we vacate the Board's decision on the ground that 'the BIA abuse[d] its discretion when it failed to state its reasons and show proper

consideration of all factors when weighing equities and denying relief,' and remand for further proceedings consistent with this opinion." 251 F.3d at 1284 (quoting *Arrozal*, 159 F.3d at 432). Boilerplate statements by the BIA (or presumably the IJ) are by definition an abuse of discretion in the deportation context:

> The BIA abuses its discretion when it fails to state its reasons and show proper consideration of *all* factors when weighing equities and denying relief. . . . Moreover, the BIA must indicate how it weighed these factors and indicate with specificity that it heard and considered petitioner's claims. A conclusory statement by the BIA concerning favorable factors is insufficient.

Arrozal, 159 F.3d at 432-33 (internal citations and quotations omitted) (emphasis in original). This is no longer an issue of first impression, and the majority errs by ignoring the CAT standard of review established by *Kamalthas*.

The majority concludes that "neither *Kamalthas* nor due process requires an IJ to rely on that evidence to grant relief when the applicant is not credible," (op. at 8868), and "[b]ecause Almaghzar's testimony was found not credible, to reverse the BIA's decision we would have to find that the reports alone compelled the conclusion that Almaghzar is more likely than not to be tortured" (op. at 8870). Such conclusions miss the point of *Kamalthas*. Under *Kamalthas*, we must inquire whether the BIA treated a CAT claim as a subset of an asylum claim and permitted the adverse

credibility finding in the asylum claim to "wash over" the CAT claim, or whether the BIA treated CAT as a separate legal basis for relief and reevaluated evidence that may have also been relevant in the asylum context, including an applicant's credibility, in light of the distinct standard for relief mandated by CAT. *See* 251 F.3d at 1283-84. The majority commits the same error the BIA committed in *Kamalthas* - it fails to recognize that there is not a single, general purpose adverse credibility determination applicable to both asylum and CAT claims. Rather, *Kamalthas*'s holding necessarily establishes the possibility that an applicant could be found to be not credible with respect to asylum, but credible with respect to CAT.

Lastly, the majority treads on dangerous ground by deciding the CAT issue in the first instance without being informed by an intervening BIA decision on the matter. *Cf.* *INS v. Ventura*, 537 U.S. 12, 123 S. Ct. 353, 154 L. Ed. 2d 272 (2002) (per curiam) (holding that the BIA should be given the opportunity to exercise its expertise [*928] in the first instance on an issue it had not addressed); *Gonzales v. Thomas*, 126 S. Ct. 1613, 164 L. Ed. 2d 358 (2006) (per curiam) (same). We do not know how the BIA would treat the country conditions evidence of torture in this case, and we do not know whether (or how) the BIA would reevaluate Almaghzar's adverse credibility determination in the asylum context in light of the evidence of torture in Yemen. Therefore, under *Kamalthas* and pursuant to the direction given to this court in particular by the Supreme Court in *Ventura* and *Thomas*, the prudent course would be for us to remand the CAT claim to the BIA so that it can make a

reasoned ruling in the first instance. On remand, the BIA should be instructed not to import the adverse credibility determination from the asylum context to Almaghzar's CAT claim and to consider Yemeni country conditions explicitly and "with specificity." *Arrozal*, 159 F.3d at 433.

I therefore respectfully dissent from the majority's decision with respect to Almaghzar's claim for relief under CAT.

ABDUL R. ALMAGHZAR, Petitioner, v. TOM RIDGE, Secretary, Department of Homeland, Security, JOHN ASHCROFT, U.S. Attorney General; and PAUL BARNETT, Administrator, Northern Oregon Correctional Facility, Respondents.

No. CV 04-188-PA

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

2004 U.S. Dist. LEXIS 18854

September 13, 2004, Decided
September 04, 2004, Filed

COUNSEL: Attorney for Petitioner: PHILIP JAMES SMITH, Hecht & Smith, LLP, Portland, OR.

KARIN J. IMMERGUT, United States Attorney, KENNETH C. BAUMAN, Assistant United States Attorney, Portland, OR.

JUDGES: OWEN M. PANNER, U.S. District Judge.

OPINION BY: OWEN M. PANNER

OPINION: OPINION AND ORDER

PANNER, J.

Abdul R. Almaghzar brings this petition for habeas relief under 28 U.S.C. § 2241, seeking relief under the Convention Against Torture. n1 I deny the petition and order that removal be stayed for thirty days.

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n1 The Convention's full citation is "the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 U.N.T.S. 85, G.A. Res. 39/46, 39 U.N. GAOR Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984); 23 I.L.M. 1027 (1984)." Wang v. Ashcroft, 320 F.3d 130, 133 n.1 (9th Cir. 2003).

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BACKGROUND

Petitioner is a native and citizen of Yemen, born in 1962. Petitioner's father was the chief of police in a small town who later became a judge. Admin. Record (R.) 135, 498.

At the age of six, petitioner was sexually abused by a family friend. Petitioner stated that as a teenage he trained as a police officer "to avenge the sexual abuse." R. 135. In a recent affidavit, petitioner states that he also wanted to be a police officer because of a 1972 gas attack on his house that killed his mother and a young sister.

Petitioner offered the testimony of Jon Mandaville, a professor of history at Portland State University. Professor Mandaville lived in Yemen for three years and last visited there in 1990. Professor Mandaville has read some of petitioner's file but did not talk to him.

Professor Mandaville stated that from 1962 to 1970, the Yemen Arab Republic, referred to as North Yemen, was torn by a civil war between Royalists and Republicans. More than 100,000 Yemenis died during the civil war.

South Yemen, formerly a British colony, drove out the British and in 1970 established a communist government. North Yemen and South Yemen then fought sporadic border wars, with both sides using intelligence operatives to spy on each other and their own citizens.

Petitioner states that after attending military school in North Yemen, he was trained in surveillance and ordered to identify persons who sympathized with South Yemen. Petitioner states that when his aunt discovered his listening devices, his aunt's brother betrayed him to agents of South Yemen. Petitioner alleges that he was kidnapped by these agents.

Petitioner testified in a 1998 immigration hearing that the South Yemeni agents took him to a prison in the south, where he was held for about nine months. Petitioner testified that he

was tortured every Friday during interrogations. Petitioner stated that the torture included electric shock; forcing his feet into hot tar or water; and putting out a cigarette on his forehead. Petitioner testified that the interrogators tried to "mastermind" him into hating his family, which was well-connected in the North Yemeni government, and forcing him to accept the communist ideology of South Yemen.

After nine months, petitioner was transferred to another prison, Al Mansoura, where he remained for more than two years. Petitioner did not claim that he was tortured there, but he did state that he was not fed properly and lost about twenty-five pounds (from 136 to 111 pounds).

Petitioner testified that before a Red Cross inspection, he was transferred to an island with three other prisoners. There were no Yemeni guards. Petitioner testified that he and his fellow prisoners relied on a Soviet vessel stationed there for food and protection from wild animals.

After eleven months on the island, petitioner was transferred back to the Al Mansoura prison. Petitioner was not tortured, but described conditions as "very low treatment, lacks any kind of humanity." R. 529. After a year and four months in the Al Mansoura prison, petitioner was released and returned to North Yemen in 1982. According to Professor Mandaville, by 1982 North and South Yemen were exchanging political prisoners.

At the hearing in 1998, petitioner testified that when he returned to North Yemen, he found that some of the agents who had captured him were now working for the government of North Yemen. He testified that this "was a very big surprise for me." R. 532.

Petitioner states in his recent affidavit that when he returned to North Yemen after his imprisonment by South Yemen, he was given a small settlement and "awarded two more stars for being a martyr." Pet'r Affid. at 3. At the 1998 hearing, petitioner testified that he was detained for three days in North Yemen. He was released on orders from "higher authorities," but he turned down an offer to work for the government.

Petitioner states that in 1983 or 1984 he worked to organize the "Truth Party," a political party with ties to the government. Petitioner states that he kept personnel files on party members, issued memberships, and recruiting new members. He states that his surveillance of other party members caused animosity towards him.

Petitioner stated that he then went to Saudi Arabia, where his father was living. He testified that he trained insurgents to fight against the communist South Yemeni government. Professor Mandaville states that Saudi Arabia did run such training camps to undermine South Yemen. However, the immigration judge at the 1998 hearing found that plaintiff's

testimony about his activities after 1982 conflicted with a previous affidavit that he had submitted in support of his asylum application.

When North and South Yemen unified in 1990, former South Yemeni officials received positions in the unified government. Petitioner testified that he thought there were officials in the unified government who would view him as a threat because of his political activities and his work with the Interior Ministry.

In his recent affidavit, petitioner claims that the Truth Party refused to cooperate with the Yemeni government's secret preparations to back Iraq in the 1991 Gulf War. Petitioner states that other factions in Yemen assassinated Truth Party members. He states that he went into hiding in Yemen when his police identification card was found near the site of an explosion that destroyed the house of a political leader. In November 1992, he fled to the United States.

Professor Mandaville stated that if petitioner was known to have worked with the Saudi government to undermine South Yemen, Southern Yemenis would remember this. According to Professor Mandaville, "if the government itself does not act against [petitioner], it will not be able or likely willing to protect him from individuals acting on their own." Mandaville Affid., at 3.

Petitioner came to the United States in November 1992. In December 1992, he applied for asylum. The asylum application was initially denied in 1994. With the assistance of a new attorney, petitioner had the agency reopen his asylum case.

In 1998, the Immigration and Naturalization Service (INS) started removal proceedings against petitioner in Portland. The asylum application was transferred to the immigration court in Portland.

On November 13, 1998, Michael Bennett, immigration judge, presided over a removal hearing for petitioner. Petitioner was represented by an attorney.

Judge Bennett denied petitioner's application for asylum and withholding of removal, and ordered that petitioner be removed to Yemen. Judge Bennett found that petitioner's testimony was "knowingly false." Judge Bennett concluded that petitioner was barred from receiving asylum or withholding of removal because he had knowingly filed a frivolous asylum application. (At the time, relief was not available under the Convention Against Torture.) Petitioner appealed the immigration judge's decision to the Board of Immigration Appeals (BIA).

In October 2000, while petitioner's appeal to the BIA was pending, petitioner pleaded guilty in this court to distribution of methamphetamine and fraudulent use of a food benefit authorization card. Petitioner, who had been managing a small grocery store in Salem, Oregon, sold methamphetamine for cash and fraudulently debited food stamps. Petitioner received a sentence of 37 months' imprisonment. United States v. Almaghzar, CR No. 00-107-KI, docket no. 28 (D. Or. Oct. 6, 2000).

In January 2003, after petitioner completed his criminal sentence, the Bureau of Immigration and Customs Enforcement (BICE) took him into custody. Because of petitioner's criminal convictions, the BIA remanded petitioner's case to the immigration judge. On March 17, 2003, the immigration judge found that petitioner was removable because the drug trafficking conviction was an aggravated felony.

On June 30, 2003, petitioner presented evidence to Judge Bennett in an attempt to explain inconsistencies in his prior testimony, and to support his new application for relief under the Convention Against Torture. Petitioner submitted an evaluation by M. John Givi, a psychologist, who found that petitioner was suffering from post-traumatic stress disorder and recurrent, moderate depression. Dr. Givi noted that petitioner's "ability to provide a linear, logical and organized history is impaired due to several factors including his low

level of education, lack of English language skills, and his cultural background." R. 143.

On August 28, 2003, Judge Bennett found that petitioner was ineligible for asylum and withholding of removal because petitioner had been convicted of a particularly serious crime and had no claim under the Convention Against Torture. The immigration judge held that petitioner had filed a frivolous asylum application. In rejecting petitioner's Convention Against Torture claim, the immigration judge stated:

> I also find that there's no basis to consider a claim under the Convention Against Torture because frankly, with the variety of stories that the [petitioner] himself has told, the misleading nature of his presentation about himself to the psychologist [Dr. Givi] taken together with the fraud conviction that he has as well as the distribution of methamphetamine which was part and parcel to those fraud operations, that the Court does not place any credibility on any of the claims whatsoever. So there would be no basis to find a Convention Against Torture claim.

On December 12, 2003, the Board of Immigration Appeals (BIA) affirmed the immigration judge's decision. The BIA ruled that the immigration judge did not err in finding that petitioner's testimony was not credible. The BIA cited

discrepancies in petitioner's testimony about his actions after his 1982 release from prison in South Yemen:

> The Immigration Judge identified substantial and material discrepancies between the written statement the [petitioner] submitted with his asylum application and the [petitioner's] testimony at the proceedings below, and the discrepancies bear a legitimate nexus to the credibility determination. For example, in his written statement, the [petitioner] stated that after he was released from imprisonment by South Yemen in 1982, he returned to North Yemen, and worked for the Yemeni Central Intelligence Agency "to organize a government party called the Truth Party.'" The [petitioner] then alleged in his statement that he was "asked to monitor the conduct and speech" of some other Truth Party members, which "led to frictions" with other members and the [petitioner's] departure to Saudi Arabia "sometime in 1984." "From 1984 to 1986" the [petitioner] alleged in his statement that he "worked with Saudi intelligence authorities" as a "recruiter and teacher at a military training camp in Jizan, Saudi Arabia," "training insurgents to fight against the . . . communist regime in South Yemen." The [petitioner] then, according to this account returned to Yemen in 1989, "resumed" his position with the Yemeni intelligence

community "gathering information" about communist sympathizers, and this "intensified" in 1990 with Yemen's unification.

In contrast, the [petitioner] testified in 1998 that 9 days after his release from imprisonment in South Yemen he was arrested by local officials in North Yemen, held for three days, released upon the intervention of North Yemeni officials, and was then offered a job with the Yemeni intelligence community "as a way to get rid of [him]." The [petitioner] testified that 3 months after he was released by South Yemen he "moved to Saudi Arabia and went to visit [his] father." When the [petitioner] was confronted with his written statement's assertion that he worked for the Truth Party until 1984 and then went to Saudi Arabia, the [petitioner] testified that after his release from his 3 day detention in North Yemen he met with his boss "on and off" for 15 days and then went to Saudi Arabia to visit his father for 1 week, before returning to North Yemen and beginning his work organizing the Truth Party through his travels within North Yemen and Saudi Arabia.

Next, the [petitioner] testified he continued his work for the Truth Party, begun in 1982, until

> 1990. When asked if he did "anything else" during this time, the [petitioner] twice failed to mention his alleged work in Saudi Arabia training "insurgents." Once confronted with this discrepancy, the [petitioner] testified that his role as a teach and trainer occurred while he was organizing the Truth Party -- explaining his earlier testimony by stating "I did not yet get there. . . . I didn't want to explain more than what the question was suggesting." The [petitioner] then testified that prior to Yemen's unification he "went back to [his] position in the Ministry of Interior . . . . to organize the peasants, the farmers, to go back to their jobs and to open food businesses." When confronted with his written statement, describing in some detail his job at the Interior as an intelligence position working against communists, the [petitioner] stated that he was "just mentioning general things" and then blamed the discrepancies on the translator of his written statement.

R. 5-6 (citations omitted).

The BIA ruled that the immigration judge's rejection of Dr. Givi's testimony was justified, in part because Dr. Givi "was not completely informed of [petitioner's] situation." R. at 6. The BIA also found that petitioner's due process rights were not violated during the 1998 or the 2003 hearings before the immigration judge. The BIA ruled that petitioner had not

shown translation errors, did not establish ineffective assistance of counsel, and had received an adequate opportunity at both hearings to present his claims.

During the proceedings here, petitioner has submitted additional documents, including two affidavits by petitioner and an evaluation, by Frank P. Colistro, Ed. D., a psychologist. Dr. Colistro found that petitioner suffered from chronic post-traumatic stress disorder and moderate depression. Dr. Colistro stated that petitioner had "memory problems" caused by

> dissociation occurring around the time of the trauma. This is a form of detachment from real life events which enables a victim to cope with them more effectively. Since he was not fully in touch with reality when the events were occurring, he has no clear recollection of them. He is not being intentionally deceptive.

Colistro Assessment at 12.

DISCUSSION

I. Standards for Claims under the Convention Against Torture

This court has subject matter jurisdiction over petitioner's claim under the Convention Against Torture. Singh v. Ashcroft, 351 F.3d 435, 440-42 (9th Cir. 2003). The United States Department of Justice has promulgated regulations to

implement the government's obligations under the Convention Against Torture. Wang v. Ashcroft, 320 F.3d 130, 133 (2d Cir. 2003) (citing 8 C.F.R. §§ 208.16-18).

To be entitled to relief under the Convention Against Torture, petitioner must prove that it was "more likely than not that he . . . would be tortured if removed" to Yemen. 8 C.F.R. § 208.16(c)(2); Kamalthas v. INS, 251 F.3d 1279, 1283 (9th Cir. 2001). "Torture" is defined as

> any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or her or a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, or intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

8 C.F.R. § 208.18(a)(1). A "petitioner carries this burden whenever he or she presents evidence establishing substantial grounds for believing that he [or she] would be in danger of being subjected to torture' in the country of removal." Kamalthas, 251 F.3d at 1284 (citations omitted). The court

should set aside an agency ruling denying relief under the Convention Against Torture if the ruling is not supported by substantial evidence. Zheng v. Ashcroft, 332 F.3d 1186, 1193 (9th Cir. 2003). "The court will reverse only if the evidence is so compelling that no reasonable fact finder could have failed to find the requisite likelihood of torture." Singh, 351 F.3d at 442.

II. The Agency's Ruling Is Supported By Substantial Evidence

I conclude that the immigration judge's credibility finding is supported by substantial evidence. The BIA's decision affirming the immigration judge cites specific discrepancies between petitioner's 1994 statement and his subsequent testimony before the immigration judge.

"Where the BIA provides a specific, cogent reason for questioning a petitioner's credibility, the petitioner must show that the evidence compelled a contrary conclusion in order to overcome the special deference accorded to the BIA's credibility determinations." Malhi v. INS, 336 F.3d 989, 993 (9th Cir. 2003). Here, petitioner has failed to show that the evidence compelled a contrary conclusion. Petitioner's descriptions of his actions after 1982 have been inconsistent.

This court may take judicial notice of evidence not available when the BIA issued its decision. See Gafoor v. INS, 231 F.3d 645, 655-56 (9th Cir. 2000). I disregard, however, petitioner's recently submitted affidavits to the extent that the

affidavits attempt to explain discrepancies pointed out by the immigration judge regarding events to which petitioner has already testified. The BIA may discredit an alien's testimony based on internal inconsistencies, and this court must accept the BIA's credibility findings if they are supported by substantial evidence.

I conclude that the immigration judge's ruling on petitioner's Convention Against Torture claim is supported by substantial evidence. Petitioner's evidence is not so compelling that "no reasonable fact finder could have failed to find the requisite likelihood of torture." Singh, 351 F.3d at 442.

III. Petitioner's Due Process Rights Were Not Violated

Petitioner contends that the immigration judge violated his due process rights by refusing to permit him to present new evidence in support of the Convention Against Torture claim, summarily dismissing his expert witness, Dr. Givi, and applying the frivolous asylum application bar.

"The Due Process Clause requires that aliens threatened with deportation are provided with the right to a full and fair hearing. A neutral judge is one of the most basic due process protections. As part of a right to a full and fair hearing, an alien is entitled to a reasonable opportunity to present evidence on his behalf." Reyes-Melendez v. INS, 342 F.3d 1001, 1006 (9th Cir. 2003) (citations and quotation marks omitted). An immigration judge violates an alien's right to due process if the judge " behaved not as a neutral fact-finder interested in hearing the petitioner's evidence, but as a

partisan adjudicator seeking to intimidate [the applicant] and his counsel.'" Taha v. Ashcroft, 362 F.3d 623, 628 (9th Cir. 2004) (quoting Colmenar v. INS, 210 F.3d 967, 971 (9th Cir. 2000) (brackets in Taha)).

In Taha, the Ninth Circuit found no due process violation even though the judge "may have had some preconceived notions about Taha and his claim even before he testified substantively, and then directed several inappropriate comments to Taha and his counsel during the hearing. While unfortunate, this behavior did not violate due process." 362 F.3d at 628-29. The Ninth Circuit distinguished expressions of annoyance, dissatisfaction, or anger from conduct indicating such favoritism or antagonism "'as to make fair judgment impossible.'" Id. at 629 (citation omitted).

Here, the immigration judge found that petitioner was not truthful because of several inconsistencies. The judge may seemed impatient during the hearings because of these discrepancies. He did, however, allow petitioner to present evidence, and did not show actual antagonism.

I conclude that the immigration judge's conduct at the hearings in 1998 and in 2003 did not violate petitioner's due process rights. I also conclude that petitioner's application for asylum and withholding of removal were properly denied.

CONCLUSION

The Petition for Writ of Habeas Corpus (# 1) is denied. The stay of removal is continued for thirty days.

IT IS SO ORDERED.

DATED this 13th day of September, 2004.

OWEN M. PANNER

U.S. District Judge

JUDGMENT

Based on the record, judgment is for respondents.

DATED this 14 day of September, 2004.

OWEN M. PANNER

U.S. District Judge

U.S. Department of Justice

Decision of Board of Immigration Appeals

Executive Office for Immigration Review

Falls Church, Virginia 22041

File: A72 775 104 – Portland Date: DEC 12 2003

In re: ABDUL RAHMAN ALMAGHZAR

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Pro Se

ON BEHALF OF DHS: Jean N. Foden-Vencil

Assistant District Counsel

CHARGE: Sec. 237(a)(1)(B), I&N Act [8 U.S.C. § 1227(a)(1)(B)] – In the United States violation of law

237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] – Convicted of aggravated felony

APPLICATION: relief under the Convention Against Torture

The respondent has appealed an Immigration Judge's August 28, 2003, decision holding that the respondent has been convicted of a particularly serious crime and did not establish eligibility for relief under the Convention Against Torture. *See* section 241(b)(3)(B)(ii) pf the Immigration and Nationality Act, 8 U.S.C. § 1231(b)(3)(B)(ii); 8.C.F.R. §§ 1208.16(c)-1208.18. The Immigration Judge held in a prior decision, issued on November 13, 1998, that the respondent had not credibly testified and had knowingly filed a frivolous asylum application. *See* 8 C.F.R. § 208.20. The Immigration Judge adopted these findings in his August 28, 2003, decision as well. The Immigration Judge's August 28, 2003, decision resulted from our remand, dated February 5, 2003, from the respondent's appeal of Immigration Judge's 1998 decision. We had remanded the record because the Department of Homeland Security ("the DHS," formerly the Immigration and Naturalization Service) had submitted new evidence that the respondent had recently been convicted of an aggravated felony.

In the respondent's appeal of the Immigration Judge's November 13, 1998, decision, the respondent contested the Immigration Judge's holdings that he did not credibly testify and knowingly filed a frivolous asylum application. The respondent also asserted that his due process rights were violated by the ineffective assistance of counsel, poor interpretation, and the Immigration Judge's questioning. On appeal from the Immigration Judge's most recent August 28, 2003, decision, the respondent asserts that the Immigration Judge did not give him adequate opportunity to further testify regarding claims for his relief. The respondent also asserts

that the Immigration Judge gave insufficient weight to the testimony of a doctor who had administered psychological examinations to the respondent following the Immigration Judge's initial decision on November 13, 1998. We will consider the respondent's appeals from both of the Immigration Judge's decisions and we will dismiss both appeals.

We defer to the Immigration Judge's November 13, 1998, adverse credibility determination. n1. *See Matter of A-S-*, 21 I&N Dec. 1106 (BIA 1998)(holding that we will generally defer to an Immigration Judge's adverse credibility findings). The Immigration Judge identified substantial and material discrepancies between the written statement the respondent submitted with his asylum application and the respondent's testimony at the proceedings below, and the discrepancies bear a legitimate nexus to the credibility determination. *See Singh-Kaur v. INS*, 183 F. 3d 1147 (9th Cir. 1999). For example, in his written statement, the respondent stated that after he was released from imprisonment by South Yemen in 1982, he returned to North Yemen, and worked for the Yemeni Central Intelligence Agency "to organize a government party called the 'Truth Party'" (Exh. 2 at 20). The respondent then alleged in his statement that he was "asked to monitor the conduct and speech" of some other Truth Party members, which "led to frictions" with the other members and the respondent's departure to Saudi Arabia "sometime in 1984" (Exh. 2 at 20). "From 1984 to 1986" the respondent alleged in his statement that he "worked with Saudi intelligence authorities" as a "recruiter and teacher at a military training camp in Jizan, Saudi Arabia," "training

insurgents to fight against the .... communist regime in South Yemen" (Exh.2 at 20-21). The respondent then, according to this account, returned to Yemen in 1989, "resumed" his position with the Yemeni intelligence community " gather[ing] information" about communist sympathizers, and this "intensified" in 1990 with Yemen's unification (Tr. at 21).

In contrast, the respondent testified in 1998 that 9 days after his release from imprisonment in South Yemen he was arrested by local officials in North Yemen, held for 3 days, released upon the intervention of North Yemeni officials, and was then offered a job with the Yemeni intelligence community "as a way to get rid of [him]" (1998 Tr. at 55-61). The respondent testified that 3 months after he was released by South Yemen he "moved to Saudi Arabia and went to visit [his] father" (1998 Tr. at 60). When the respondent was confronted with his written statement's assertion that he worked for the Truth Party until 1984 and then went to Saudi Arabia, the respondent testified that after his release from his 3 day detention in North Yemen he met with his boss "on and off" for 15 days and then went to Saudi Arabia to visit his father for 1 week, before returning to North Yemen and beginning work organizing the Truth Party through his travels within North Yemen and Saudi Arabia (1998 Tr. at 70-76).

Next, the respondent testified he continued his work for the Truth Party, begun in 1982, until 1990 (1998 Tr. at 76-77). When asked if he did "anything else" during his time, the respondent twice failed to mention his alleged work in Saudi Arabia training "insurgents" (1998 Tr. at 77-78). Once

confronted with the discrepancy, the respondent testified that his role as a teacher and trainer occurred while he was organizing for the Truth Party-explaining his earlier testimony by stating, "I did not yet get there.... I didn't want to explain more than what the question was suggesting" (1998 Tr. at 78-79). The respondent then testified that prior to Yemen's unification he "went back to [his] position in the Ministry of Interior....to organize the peasants, the farmers, to go back to their jobs and to open food businesses" (1998 Tr. at 81-83). When confronted with his written statement, describing in some detail his job at the Interior as intelligence position working against communists, the respondent stated that he was "just mention[ing] general things" and then blamed the discrepancies on the translator of his written statement (1988 Tr. at 90-91.)

The respondent also failed to adequately explain any of these discrepancies during the 2003 proceedings below. The Immigration Judge's finding at the 2003 proceedings that the psychologist's new testimony and diagnoses did not reasonably explain the material discrepancies in the record was not clearly erroneous (2003 I.J. at 4-5). For example, the psychologist was not completely informed of the respondent's situation (2003 I.J. at 4-5). We find that the discrepancies between the respondent's testimony and written statement are material for his claim for relief, are not simply the result of the addition or omission of details, and have not been reasonably explained. *See Shah v. INS,* 220 F.3d 1062 (9th Cir. 2000); *Cordon-Garcia v. INS,* 204 F.3d 985 (9th Cir. 2000).

The discrepancies and inadequate explanations are such that we uphold the Immigration Judge's finding that the respondent knowingly filed a frivolous asylum application. *See* 8 C.F.R. § 208.20. The discrepancies regarding the respondent's political activities are material to his asylum application because he claimed to fear harm primarily as a result of those activities (Tr. at 99-100; Exh. 20 at 3-4). *See id.*

We also find that the respondent's due process rights were not violated during either the 1998 or the 2003 Immigration Court proceedings. The respondent has not produced any evidence of translation errors and has not met the procedural requirements for a claim of ineffective assistance of counsel to be considered. *See Iturribarria v. INS*, 321 F.3d 889, 900 (9th Cir. 2003). Additionally, we find that the respondent was given adequate opportunity, both in 1998 and 2003, to present his claims for relief.

ORDER: The appeals are dismissed.

s/Frederick D. Hess

FOR THE BOARD

----------Footnotes----------

n1 In considering the respondent's appeals, we have only applied the clearly erroneous standard of review to the new factual findings in the Immigration Judge's 2003 decision. *See Matter of S-H-*, 23 I&N Dec. 462 (BIA 2002).

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
Portland, Oregon

File No.: A 72 775 104 August 28, 2003

In the Matter of

ABDUL RAHMAN	)	
ALMAGHZAR,	)	IN REMOVAL
		PROCEEDINGS
	)	
Respondent	)	

CHARGE:

APPLICATION:

ON BEHALF OF RESPONDENT: John J. Marandas, Esq.
ON BEHALF OF SERVICE: Jean Foden-Venicl, Esq.

ORAL DECISION OF THE IMMIGRATION JUDGE

I. Background

This is an oral decision being delivered after a merits hearing conducted on June 30, 2003 based on a remand by the Board of Immigration Appeals to this Court of this case. The original decision in which the Court denied asylum and withholding of removal was entered on October 15, 1998 and the appeal of that was remanded after the then Immigration and Naturalization Service submitted to the Board of Immigration Appeals that the Respondent had been convicted on two separate counts in separate matters in the United States District Court, District of Oregon, of fraudulent use of a food benefit authorization card commonly understood as a food stamp card or benefit and distribution of methamphetamine. The Board took the Service's submission of those conviction records to it as a motion to remand.

The Court took the case, of course, as a remand that the Court would have to consider the effect of those convictions of the Respondent. There are several issues then, for the Court to determine. First of all, of course whether or not the convictions were for particularly serious crime and if so, whether the Respondent qualified for any kind of relief. The Court is also considering not only the asylum and withholding of removal, but relief under the Convention Against Torture.

In the scope of the remand, since the Court had made a negative credibility finding, and filing of a frivolous application, the Court gave the Respondent an opportunity to

at least respond to those determinations with further evidence if the Respondent wished to.

II. Evidence on Remand

On the remand, the primary evidence submitted was, of course, the testimony of the Respondent and also the testimony and written evaluation of psychologist, Dr. Han Givvy. In addition to that, the following documents were also considered. The record below is fully incorporated. The Respondent's supplemental pre-hearing statement of proof submitted on May 7, 2003; the confidential and psychological evaluation of Dr. John Givvy was nonetheless considered and admitted at trial on June 30th and the I-261 alleging the new convictions were submitted as well.

The Court has considered all of the evidence, documentary and testimonial, whether or not I specifically mention it here. The Respondent's testimony the Court has already dealt with the direct testimony at the trial on November 13, 1998 and I'm not going to repeat that.

III. Analysis of Particularly Serious Crime

The Court has determined, based on the Respondent's testimony and the evidence of the record, including the conviction records and the other reports associated with it, that the Respondent's crime of the fraudulent use of a food benefit and the distribution of methamphetamine are particularly serious. In that, the Court is guided by the following cases. Matter of Carballi, 19 I&N Dec. 357 (BIA

1986); Matter of Frantescu, 19 I&N Dec. 244 (BIA 1982); and then the recent decision by the Attorney General, Matter of Gene _____, I&N Dec. _____, A.G. 2002). The Court, based on the level of sophistication and the nature of the business transactions and the selling of the drugs all from the Respondent's business, is satisfied that these are particularly serious. On an individualized determination, this in and of itself would render the Respondent ineligible for both asylum and withholding of removal.

The Court would not analyze those applications further.

IV. Credibility

The Court viewed the evidence submitted by the Respondent, his testimony at this remand and the testimony of Dr. John Givvy primarily to be used to overcome the Court's determination that the Respondent had submitted a frivolous asylum application after being advised of that as required under Section 208 (a) (4) of the Act and the finding made under Section 208 (d) (6) that the testimony was intended to both rehabilitate that finding and set out potential eligibility under the Convention Against Torture.

In addition to the background submitted by the Respondent, the Court is also considering the following cases with regard to making its credibility determination as set out as follows. Sicar v. INS, 183 F. 3rd. Level 47 (9th Cir. 1999); Matter of A-S-, 21 I&N Dec. 1106 (BIA 1998); Akenmaddi v. INS, 196 F. 3rd. 951 (9th Cir 1999). I'm considering the issues also regarding typo or non-material representations

how they should be considered under Tercios v. INS, 821 F. 2nd 1396 (9th Cir. 1987) and Domazijo v. INS, 787 F. 2nd 1332 (9th Cir. 1986).

A. Evaluation of Testimony and Written Evaluation of Dr. John Givvy

The Court does not place any weight under that as I stated at trial because I find that Dr. Givvy's evaluation to be discredited. First of all, Dr. Givvy, instead of evaluating the Respondent in what I would call a "objective" manner about his psychological background, relied primarily on the immigration documents including the transcript and the appeal arguments made by the Respondent in appeal of this Court's decision. That would cause his evaluation to be suspect in and of itself. But what's more, in his determination that the Respondent was not malingering, had suffered post traumatic stress, was sexually abused as a child, he also considered that the Respondent to have lower end cognitive abilities and executive functions to be impaired. He was not aware and was given no information about the Respondent's convictions in federal court for the fraudulent use of a food benefit card and distribution of methamphetamine, all which involved a rather sophisticated scheme through a small grocery business that the Respondent set up with family help from his relatives back in the Middle East. The Court, for those reasons, does not place any weight on the evaluation of Dr. Givvy and I do not place any weight on the Respondent's claim now of the abuse and/or potential mistreatment that he says occurred.

The Court finds therefore, that the Respondent is not credible for the same reasons given and I do not find that this has been rehabilitated or that there is any credible evidence that he suffers some psychological impairment which otherwise would cause the Court to erroneously conclude that the Respondent was not credible and had intentionally lied or mislead the Court through this hearing process.

I find, therefore, that he has intentionally filed a false claim and I am going to reinstitute the findings.

I also find that there's no basis to consider a claim under the Convention Against Torture because frankly, with the variety of stories that the Respondent has told, the misleading nature of his presentation about himself to the psychologist taken together with the fraud conviction that he has as well as the distribution of methamphetamine which was part and parcel to those fraud operations, that the Court does not place any credibility on any of the claims whatsoever. So there would be no basis to find a Convention Against Torture claim.

The following orders are therefore entered.

ORDER

IT IS ORDERED that the Respondent's request for asylum and withholding of removal are again denied as he is ineligible because of conviction of a particularly serious crime.

The Court finds nonetheless, still that the Respondent has made a frivolous application for asylum under Section 208 (d) (6) of the Act.

The Court finds that the Respondent has no claim under the Convention Against Torture.

IT IS ORDERED Respondent be removed to Yemen.

s/Michael H. Bennett

MICHAEL H. BENNETT

Immigration Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

October 26, 2006

CATHY A. CATTERSON
CLERK, U.S. COURT OF APPEALS

ABDUL R. ALMAGHZAR, Petitioner – Appellant, v. ALBERTO R. GONZALEZ, Attorney General, Respondent – Appellee.	No. 04-35863 D.C. No. CV-04-01888-PA District of Oregon, Portland ORDER

Before: FISHER, GOULD, and BEA, Circuit Judges

A majority of the panel has voted to deny the Petition for Rehearing and the Petition for Rehearing En Banc. Judge Fisher would have granted the petitions.

The full court has been advised of the Petition for Rehearing En Banc and no judge of the court has requested a vote on whether to rehear the matter en banc.

Fed. R. App. P. 35

The Petition for Panel Rehearing and the Petition for Rehearing En Banc are DENIED.

U.S. Const. art. I, § 9, cl. 2

The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

U.S. Const. amen. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

28 U.S.C. § 2241. Power to grant writ

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless--

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or

exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

(e) (1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

(2) Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note), no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or

its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

28 U.S.C. § 2253. Appeal

(a) In a habeas corpus proceeding or a proceeding under section 2255 [28 USCS § 2255] before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c) (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255 [28 USCS § 2255].

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231

Sec. 106. JUDICIAL REVIEW OF ORDERS OF REMOVAL.

(a) In General.--Section 242 of the Immigration and Nationality Act (8 U.S.C. 1252) is amended—

(1) in subsection (a)—

(A) in paragraph (2)—

(i) in subparagraph (A), by inserting "(statutory or nonstatutory), including section 2241 of title 28, United States Code, or any other habeas corpus provision, and sections 1361 and 1651 of such title" after "Notwithstanding any other provision of law";

(ii) in each of subparagraphs (B) and (C), by inserting "(statutory or nonstatutory), including section 2241 of title 28, United States Code, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as

provided in subparagraph (D)" after "Notwithstanding any other provision of law"; and

(iii) by adding at the end the following:

"(D) Judicial review of certain legal claims.--Nothing in subparagraph (B) or (C), or in any other provision of this Act (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section."; and

(B) by adding at the end the following:

"(4) Claims under the united nations convention.--Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, United States Code, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of any cause or claim under the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman, or Degrading Treatment or Punishment, except as provided in subsection (e).

"(5) Exclusive means of review.-- Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, United States Code, or any other

habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this Act, except as provided in subsection (e). For purposes of this Act, in every provision that limits or eliminates judicial review or jurisdiction to review, the terms 'judicial review' and 'jurisdiction to review' include habeas corpus review pursuant to section 2241 of title 28, United States Code, or any other habeas corpus provision, sections 1361 and 1651 of such title, and review pursuant to any other provision of law (statutory or nonstatutory).";

(2) in subsection (b)(9), by adding at the end the following: "Except as otherwise provided in this section, no court shall have jurisdiction, by habeas corpus under section 2241 of title 28, United States Code, or any other habeas corpus provision, by section 1361 or 1651 of such title, or by any other provision of law (statutory or nonstatutory), to review such an order or such questions of law or fact."; and

(3) in subsection (g), by inserting "(statutory or nonstatutory), including section 2241 of title 28, United States Code, or any other habeas corpus provision, and sections 1361 and 1651 of such title" after "notwithstanding any other provision of law".

(b) <8 USC 1252 note> Effective Date.--The amendments made by subsection (a) shall take effect upon the date of the

enactment of this division and shall apply to cases in which the final administrative order of removal, deportation, or exclusion was issued before, on, or after the date of the enactment of this division.

(c) <8 USC 1252 note> Transfer of Cases.--If an alien's case, brought under section 2241 of title 28, United States Code, and challenging a final administrative order of removal, deportation, or exclusion, is pending in a district court on the date of the enactment of this division, then the district court shall transfer the case (or the part of the case that challenges the order of removal, deportation, or exclusion) to the court of appeals for the circuit in which a petition for review could have been properly filed under section 242(b)(2) of the Immigration and Nationality Act (8 U.S.C. 1252), as amended by this section, or under section 309(c)(4)(D) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. 1101 note). The court of appeals shall treat the transferred case as if it had been filed pursuant to a petition for review under such section 242, except that subsection (b)(1) of such section shall not apply.